Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-118

DALLAS NORMAN HOUSE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CRICUIT

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(a)

REFERENCE TO OFFICIAL REPORT

The opinion of the United States Court of Appeals for the Fifth Circuit in this case was entered on May 7, 1976, under Local Rule 21 and is in summary form. It is unreported. It is captioned UNITED STATES OF AMERICA, Appellee v. DALLAS NORMAN HOUSE, Appellant. A copy of the official opinion in this case is appended hereto.

(b)

GROUNDS OF JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit sought to be reviewed here

is not published in the official reporter. It is entitled United States of America v. Dallas Norman House, No. 75-4064, and is dated May 7, 1976. The court below entered an order denying a petition for re-hearing en banc on June 16, 1976, and on June 25, 1976, denied Petitioner's Motion for Stay of the issuance of the mandate pending petition for Writ of Certiorari. The mandate was issued on the same date. Petitioner has filed a petition in this Court to permit him to remain free on bond pending this Court's disposition of his petition for the Writ of Certiorari. At the time this Petition is being dictated and forwarded to the printer, this Court has not acted on said petition.

The jurisdiction of this Court is invoked under 28 USC 1254(1), and under and by virtue of Title 18 USC 3772, within the time provided by Rule 22(2) of the Supreme Court Rules.

Jurisdiction of this Court is invoked because the United States Court of Appeals for the Fifth Circuit has decided important questions of Federal Law of gravity and importance in the administration of criminal justice which have not been and should be settled by this Court. That Court has construed and applied statutes of the United States in a criminal case inconsistent with the strict construction required by decisions of this Court; has by its construction extended by intendment a legislative act beyond the plain language of the statute; and has in effect, violated the tripartite scheme of government by attempting to either supply legislative omissions through interpretation or to effectuate prohibitions not contemplated by statute.

(c)

QUESTION PRESENTED

WHERE CONGRESS HAS DEFINED THE TERM "MARIHUANA" AS BEING ALL OF THE PARTS OF THE PLANT CANNABIS SATIVA L. WHETHER GROWING OR NOT, WITH CERTAIN EXCEPTIONS, DOES THIS DEFINITION AS A MATTER OF LAW INCLUDE ALL CANNABAS, REGARDLESS OF SPECIES, INCLUDING, BUT NOT LIMITED TO CANNABIS INDICA AND CANNABIS RUDERALIS?

(d)

STATUTES INVOLVED

The relevant portion of the statutes involved and which portions are pertinent to the question presented are as follows:

Title 21, Section 802(15):

The term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks or a cake made from the seeds of such plant, or any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, or, cake, or the sterilized seed of such plant which is incapable of germination.

Title 21, Section 841(a)(1):

Except as authorized by this subchapter, it shall be unlawful for any person to knowingly or intentionally—(1) to manufacture, distribute, or dispense or possess with intent to manufacture, distribute, or dispense, a controlled substance.

Title 21, Section 841(b)(1)(B):

In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person (who violates 21 USC 841(a)) shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000.00, or both.

Title 21, Section 952(a):

It shall be unlawful to import into the customs territory of the United States or any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter.

(e)

STATEMENT OF THE CASE

Petitioner was indicted, tried and convicted in the United States District Court for the Northern District of Georgia, Gainesville Division, on a two count indictment. The first count of the indictment charged the substantive offense of unlawful possession with intent to distribute a Schedule I controlled substance, marihuana,

in violation of 21 USC 841(a)(1). The second count of the indictment charged that the substantive offense of illegal importation of marihuana into the United States from a place outside thereof, in violation of 21 USC 952(a).

Following his conviction, Petitioner appealed to the United States Court of Appeals for the Fifth Circuit, raising the question presented here. That Court denied Petitioner's Suggestion for Hearing En Banc and thereafter summarily affirmed the convictions from which the appeal was prosecuted. Under date of June 25, 1976, the United States Court of Appeals for the Fifth Circuit denied Petitioner's Motion for Re-Hearing En Banc and denied his motion for stay of the issuance of the mandate pending petition for Writ of Certiorari. On the same date, it issued its mandate to the trial court.

The facts disclosed by the record in this case are somewhat lengthy, but relatively simple. We think it sufficient to say that the evidence would support a finding by the jury that Petitioner with others participated in the importation of a species of marihuana from a point outside of the United States into the United States without clearing customs or otherwise declaring the cargo. The quantity of the substance so imported was sufficient to justify a conclusion on the part of the jury that the substance was possessed with intent to distribute the same.

During the course of the trial, the United States introduced the testimony of its expert witness for the purpose of establishing that the plant seized during the course of the investigation was marihuana and that the same was Cannabis sativa L. Petitioner tendered

the testimony of its expert witness, Dr. Richard Evans Schultes, a taxonomic botanist for the purpose of establishing that the marihuana is a polytypic plant, having more than one species. His proffered testimony was to the effect that the specific species of the plant could not be determined by the tests administered by the government chemist; therefore, the species of the plant in evidence could not be any one of at least three species known in the scientific community.

The testimony of Schultes was ruled inadmissible and was not heard by the jury, based upon a ruling of the trial court that all marihuana, regardless of its species, is marihuana prohibited by the statute and defined as Cannabis sativa L. The trial court instructed the jury, in effect, that if it should find the plant in evidence to be any kind of marihuana, regardless of species, it would be authorized to convict.

(f)

REASONS FOR GRANTING THE WRIT

In enacting the pertinent statutes, Congress prohibited the possession and the importation of "marihuana" and specifically defined the term "marihuana" as the plant Cannabis sativa L. The statutory definition of marihuana is specific and thereby excludes all other species of marihuana. The governing principle of law applicable here is that penal statutes are to be interpreted with exactitude, that is, they are to be construed strictly, not loosely. Statutes will not be read to create crimes, unless the purpose to do so is plain. One is not subject to a penalty unless the words of the statute plainly impose it. Criminal statutes are not to be broadened beyond the fair import of their language and legislative omissions in criminal statutes can only be

remedied by legislative action. It is not the function of the courts to extend the plain language of the statute to make criminal that which the legislative body either overlooked, expressly omitted or did not in fact make criminal.

This Court has steadfastly and unwaveringly refused to extend a criminal statute beyond the plain meaning of its words, adhering to the principle that the power of punishment is vested in the legislative, not the judicial department and it is for the legislature, not the Court, to define a crime and ordain its punishment.

The courts below, and other courts to which we will refer herein, have so far departed from these established principles that this Court should restate them and apply them in this case. Logic, reason and established law do not permit the result reached by the court below. In its ruling, the Fifth Circuit has so far departed from the accepted and prescribed rules of construction that its decision in this case should be reviewed and set aside by this Court, as it has decided an important and significant question of Federal Law by applying a rule of construction contrary to precedence of this Court.

More than this, the Fifth Circuit has attributed to the statutes definitions which Congress rejected and thereby has subjected Petitioner to penal sanctions beyond the scope of the legislative pronouncement. At the time Congress defined the word "marihuana" it was knowledgeable of the fact that Cannabis is polytypic and nevertheless elected to deal with only a single species of the same in the relevant statutes.

RESTATEMENT OF QUESTION PRESENTED

Where Congress Has Defined the Term "Marihuana" As Being All of the Parts of the Plant Cannabis Sativa L. Whether Growing or Not, With Certain Exceptions, Does This Definition As a Matter of Law Include All Cannabis, Regardless of Species, Including, But Not Limited to Cannabis Indica and Cannabis Ruderalis?

In short, the testimony of Charles C. Clark, a government chemist, was that he examined and testified the exhibited marihuana and that, in his opinion, it was the species defined by 21 USC 802(15), that is, Cannabis sativa L. He based his opinion upon visual and chemical tests, described in his testimony, which disclosed the presence of tetrahybrocannabiol (THC) in the plant, together with his opinion that there is only one species of marihuana.

The testimony of Dr. Richard E. Schultes, a renowned taxonomist, was proffered by Petitioner, but rejected by the Court. His testimony was in substance that the exhibited plant was marihuana, but that neither a visual examination nor chemical tests alone could establish its species. According to his testimony, there are presently three known and recognized species of the plant, all of which contain the chemical THC. Based upon his visual examination of the exhibit, he expressed his opinion that it was impossible to determine the specific nomenclature of the plant and to determine whether it was sativa, indica or ruderalis, and that in no event could its species be determined by visual and chemical tests alone.

The witness, Dr. Schultes, is the same Dr. Richard Schultes referred to by this Court as an authority on the subject in its opinion in *Leary* v. *United States*, 395

U.S. 6, 50-51, Footnote 106. From his testimony as it appears in the record, the plant family involved is scientifically known as Cannabaceae. This is the family category. The next category down from the family is a genus. In the Cannabaceae, there are two geni. One of these is the genus Cannabis, which has three known species, one of which is sativa. The other two species are indica and ruderalis. Historically, the species sativa has been known in the "scientific community" since 1753; indica has been known since 1783; and ruderalis has been known since 1924. Dr. Schultes rejected the idea that Cannabis is monotypic, since it has been an accepted fact that since 1783, the genus is polytypic and from 1926 to the present date, three species have been known.

Taxonomy deals with the classification of plants, a field in which taxonomists are experts; the field in which Dr. Schultes attained his doctorate and, in part, his qualifications for being Director of Harvard Botanical Museum. His testimony included the history of the discovery and classification of Cannabis, the plant anatomy characteristics, structure and functional variations.

The trial court heard the evidence proffered in the form of Dr. Schultes' testimony, but declined to submit this evidence to the jury, based upon the ruling, in effect, that if the jury found the plant to be marihuana, as a matter of law, it was immaterial whether it was sativa, indica, ruderalis or any other species. This judgment was affirmed by the Fifth Circuit.

The principal issue thus made is whether the statutory definition of marihuana includes all species of that plant or only the species defined by 21 USC 802(15). This question has been decided adversely to the con-

tentions urged by Petitioner on a number of occasions. Our research has disclosed that with the exception of the Sixth Circuit and the Seventh Circuit Courts of Appeals, the argument urged here has been uniformly rejected by the United States Courts of Appeal.[1]

Despite this weight of authority, the argument still remains that the courts have clearly extended the language of the statute beyond its clear and unambiguous specifics. This application is clearly not in accord with the basic principle that statutes creating and defining crimes are not to be extended by intendment. In ruling as they have, the courts have extended, as a matter of law, the reach of a criminal statute by looking at the intent of Congress behind the words, "Cannabis sativa L." The effect is to redefine the term by adding to the statutory definition the words, "and all other species of Cannabis."

In defining marihuana, Congress necessarily had a purpose and also an awareness that more than one species of marihuana or Cannabis, existed or might be extant. Otherwise, no logical reason can be ascribed for the definition. The terms marihuana and Cannabis are apparently interchangeable as they denote the same

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1. *United States* v. *Honneus*, 508 F.2d 566 (1st Cir. 1974); *United States* v. *Kinsey*, 505 F.2d 1354 (2d Cir. 1974); *United States* v. *Rothberg*, 480 F.2d 534 (2d Cir. 1973), cert. denied, 414 U.S. 856 (1973); *United States* v. *Moore*, 446 F.2d 448 (3d Cir. 1972), cert. denied, 406 U.S. 909 (1972); *United States* v. *Sifuentes*, 504 F.2d 845 (4th Cir. 1974); *United States* v. *Gaines*, 489 F.2d 690 (5th Cir. 1974); *United States* v. *Denapoli*, 519 F.2d 104 (1975); *United States* v. *Gavic*, 520 F.2d 1346 (8th Cir. 1975); *United States* v. *Kelly*, 527 F.2d 961 (9th Cir. 1976); *United States* v. *King*, 485 F.2d 353 (10th Cir. 1973); *United States* v. *Ludwig*, 508 F.2d 140 (10th Cir. 1974); *United States* v. *Spann*, 515 F.2d 579 (10th Cir. 1975); *United States* v. *Walton*, 514 F.2d 201 (D.C. Cir. 1975).

meaning, although Cannabis is more scientifically definitive. If Congress intended to include more than that specifically defined, it could have easily done so by merely referring to marihuana as Cannabis. Instead, it chose to descend to the particulars. There can be no reasonable explanation, except that Congress meant what it said.

In 21 USC 802(15), as it did in 26 USC 4761(2), Congress thought it necessary to define the word marihuana, and with exceptions not relevant here, defined it and limited it as follows:

> The term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, or preparation of such plant, its seeds or resin. . . .

Some of the cases cited in the footnote rely in part upon *Leary* v. *United States*, 295 U.S. 6, 50 (1969), in support of the observation that there is only one species of marihuana or Cannabis. Such a statement was made in *Leary*, but to be more exact, the statement was: "From appearance *it seems* that there is only one species of marihuana." Emphasis supplied. This Court did not rule in that case that only one species of marihuana exists. The question was not before it and it was discussing only the question of whether a statutory presumption was constitutional. As we have stated above, the authority for the statement made by this Court in this instance was Dr. Richard Schultes, the same person whose testimony was offered in this case to establish that there are more than one specie of the plant.

In view of the authorities cited, the decision of the United States District Court in *United States* v. *Lewallen*, 385 F.Supp. 1140 (U.S.D.C. Wis. 1974), which refused to follow them, is impressive. Not only does it answer the issue, it responds to the decisions completely and even meets arguments later accepted in decisions rendered subsequent to its review of the then decided cases. That Court said:

> But the decisive point, it seems to me, is that those whose very function is to weigh the significance of the distinction between plants within a genus—the plant taxonomists consider the distinctions among the Cannabis sativa L. and Cannabis indica Lam. sufficient to categorize them as different species. It does not seem to me decisive whether those engaged in botanical taxonomy had addressed and investigated this question deliberately and consciously, and had arrived at some scholarly consensus, prior to 1938 or prior to 1970, when Congress acted or whether this came later. Rather, the critical factor is whether in fact the distinctions between Cannabis sativa L. and Cannabis indica Lam. (and perhaps Cannabis ruderalis Jan.) are so insignificant that they are not to be treated as distinct species within the genus Cannabis. On the basis of this record, the distinctions are not in fact so insignificant. That penal statutes are to be strictly construed requires no citation of authority.

In *United States* v. *Collier*, 14 Cr.L. 2501 (D.C. Super. Ct. 1974), the Court held that the words "Cannabis sativa L." did not include other species of the genus, Cannabis. In a well reasoned opinion, the Court noted the specific language defining marihuana and explained the rationale behind the ruling:

> Legislative omissions in criminal statutes can only be remedied by legislative action. In our tripartite scheme of government, courts are not permitted to effectuate what appears to be legislative intent by extending the reach of a penal statute beyond its plain language.

We are taught by that authority that in the 1937 House hearings on the Marihuana Tax Act, Harry J. Aslinger, Commissioner of Narcotics, Bureau of Narcotics, Department of Treasury, found great difficulty in distinguishing botanical identification, chemical composition, and preparations made from the plant. Aslinger stated that "Marihuana is the same as Indian Hemp, Hashish" and that marihuana "is known as cannabin, Cannabis americana, or Cannabis sativa. Marihuana is the Mexican term for Cannabis indica." Hearings on H. R. 6385 before the House Committee on Ways and Means, 75th Congress, 1st Session, 18 and 19 (1937).

Lyster H. Dewey, formerly in charge of the Agricultural Department's Fiber Section maintained that "There is only one species known as hemp," Cannabis sativa. Ibid. at 55. But Dewey was contradicted in this view by Dr. S. L. Hilton, appearing as a representative of the American Pharmaceutical Association, who frequently referred to Cannabis indica throughout his testimony. Ibid. at 121 to 122.

When the proposed Uniform Narcotics Act came before Congress one year later, there had been no significant advance in expert and legislative understanding of the botany of the Cannabis plant. As is true of all Uniform Acts, the Uniform Narcotics Act was drafted under the aegis of the National Conference of

Commissioners on Uniform State laws. The first draft of the Act was prepared in 1925 and five tentative drafts (including two third drafts) were subsequently written before the Act was finally adopted by the Commissioners in 1932. Given the extensive mention of Cannabis species other than Cannabis sativa in the botanical and legal literature, it was quite unlikely that the drafters of the Act would fail to be aware of the multiple species nomenclature, and indeed, each of the six drafts, excepting the first and third and the final draft, made explicit reference to species of Cannabis other than Cannabis sativa L. The first draft defines, "Habit forming drugs" as "Coca leaves, Opium, Cannabis indica or Cannabis sativa." The third draft and the fourth draft include a third species of Cannabis:

> "*Section 12*: (Cannabis indica, Cannabis americana and Cannabis sativa) No person shall plant, cultivate, produce, manufacture, possess, have under his control, sell, prescribe, administer, dispense or compound Cannabis indica, Cannabis americana, or Cannabis sativa, or any preparation or derivative thereof . . ."

It is thus reasonable to assume that the framers of the Uniform Narcotics Act were aware of the existence of multiple species of Cannabis or at the very least were aware of a substantial number of scientists accepted the existence of multiple Cannabis species. The inclusion of the single term "Cannabis sativa L." in the final draft of the Uniform Narcotics Act was a conscious choice made with full cognizance that botanical literature reflected the possible existence of more than one species.

The question here is not whether this choice of statutory language was provident; rather, the issue is

simply whether the drafters of the Uniform Act knew when they approved the final draft in 1932, and whether Congress knew when it enacted the Act in 1938, and the present 1970 Act, that there was a dispute in the scientific community as to the issue of whether Cannabis was polytypic. It is apparent from the foregoing that both the Commissioners and the Congress were indeed well aware of that dispute. Armed with this awareness, it was easily within the power of Congress to draft a statute sufficiently broad to include all species of Cannabis. No great imagination would have been required to accomplish this legislative objective. Indeed the United States is a signatory of the Single Convention on Narcotic Drugs which provides that "Cannabis plant" means any plant of the genus Cannabis. 18 U.S.T. 1407, at 1409 (1967).

It has long been settled that criminal statutes are to be construed strictly and that one "is not to be subjected to a penalty unless the words of a statute plainly impose it." *United States* v. *Campus-Serrano*, 404 U.S. 293 (1971). In *United States* v. *Wiltberger*, 18 U.S. 76 (1820), Justice Marshall explained the rationale behind this rule:

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of the individual; and on the plain principle that the power of punishment is vested in the legislative, not the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment. 18 U.S. at 95.

Criminal statutes and rules must be given strict interpretation in favor of defendants where substantial rights are involved. *Smith* v. *United States*, 260 U.S. 1

(1959). The Court may not extend a criminal statute beyond the plain meaning of its word for such statutes must be construed strictly. *United States* v. *Morris*, 39 U.S. 464 (1840).

This Court has been clear in its demand that clearly written statutes be construed strictly. Language of a criminal statute which is clear is conclusive as to legislative extent. *Osaka Shosen Kisha Line* v. *United States*, 300 U.S. 98 (1937). The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving of punishment his conduct may be. *Viereck* v. *United States*, 318 U.S. 236 (1943).

In *Toussie* v. *United States*, 397 U.S. 112 (1970), this Court declared:

> When choice has to be made between two readings of what Congress has made a crime, it is appropriate before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication. 397 U.S. at 122.

The fact that a particular activity may be within the same general classification and policy of those covered does not necessarily bring it within the ambit of a criminal prohibition. *United States* v. *Boston & M. R. R.*, 380 U.S. 157 (1965).

In the Comprehensive Drug Abuse and Control Act of 1970, marihuana was clearly and unambiguously defined as "all parts of the plant Cannabis sativa L., whether growing or not . . .", 21 USC 802(15). Notwithstanding this, the Appellate Courts cited in footnote 1 have ruled that, as a matter of law, marihuana is defined as Cannabis sativa L. *and all other species of Cannabis*.

As we have shown, this clearly extends the simple language of the statute beyond its scope and makes criminal conduct which Congress, for whatever reason or for no reason at all, failed to proscribe.

Those decisions are based upon two clearly impermissible rationale. First, those courts have reasoned that when Congress used the words "Cannabis sativa L." it intended to say "all Cannabis." Statutes creating and defining crimes are not extended by intendment because the Court thinks the legislature should have made them more comprehensive. *United States* v. *Weitzel*, 246 U.S. 433 (1918). This was explained by this Court in *Todd* v. *United States*, 158 U.S. 278 (1895), and forty years later it was reiterated in *United States* v. *Resnick*, 299 U.S. 207 (1936). In the former case, this Court said:

> It is axiomatic that statutes creating and defining crimes cannot be extended by intentment, and that no act however wrongful can be punished under such a statute unless clearly within its terms. . . . There can be no constructive offenses, and, before a man can be punished, his case must be plainly and unmistakably within the statute. 158 U.S. at 282.

The Courts are without power to extend the reach of a criminal statute through interpretation, surmise or conjecture. Where the language of the statute is clear and unambiguous, as in the present case, interpretation is not necessary or desirable. In such cases, it is the duty of the courts to apply the law as it is written. We have said that the intent of Congress is clear. Some of the decided

cases think not and in doing so attribute what appears to be an oversight to the theme that Congress was unaware of the existence of more than one specie of Cannabis. This contention is answered in *United States* v. *Lewallen*, supra. More than this, the awareness of Congress of the existence of more than one specie of Cannabis appears as early as 1915, when Congress made it unlawful for certain persons to sell or deliver Cannabis indica, as prohibited by 21 USC 209. It is true that this Code Section has limited scope and has no application here, but it is equally true that Congress was aware of more than one specie of Cannabis. This is clearly demonstrated in the text of *United States* v. *Collier*, supra. That the act of an accused is within the mischief prescribed by the statute is also an improper rationale. In *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), this Court endorsed the earlier language of *United States* v. *Wiltberger*, supra:

> To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because of its equal atrocity or of kindred character, with those enumerated. 378 U.S. at 363.

Although other species of Cannabis may be within the mischief which Congress sought to proscribe, it is clearly error to say as a matter of law that those species are actually proscribed by the language of the statute. In an analogous situation, this Court in *United States* v. *Maze*, 414 U.S. 395 (1974), refused to act as a legislature by looking at the intent behind clear words:

> Congress could have drafted the mail fraud statutes so as to require only that the mails in fact be used

> as a result of the fraudulent scheme. But it did not do this. . . . 414 U.S. at 405.

It is clear that in 1970, Congress could have drafted the definition of marihuana to include all species of Cannabis. Since it did not do so, it is not for the courts to act as a legislature and in effect correct Congress' mistake if any, by judicial construction.

CONCLUSION

For the reasons submitted, it is respectfully urged that this Petition for the Writ of Certiorari should be granted and that this Court should determine that the court below erred in the respects presented herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that true copies of the foregoing Petition of DALLAS NORMAN HOUSE were deposited in the United States Post Office with air mail postage prepaid, addressed to: Solicitor General of the United States, Department of Justice, Washington, D.C., and to the Honorable John W. Stokes, Jr., United States Attorney, P. O. Box 912, Atlanta, Georgia 30303.

This the 23rd day of July, 1976.

ROBERT B. THOMPSON

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-4064

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DALLAS NORMAN HOUSE,
Defendant-Appellant.

Appeal From the United States District Court for the Northern District of Georgia

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ON SUGGESTION FOR HEARING EN BANC

(Filed April 29, 1976)

Before COLEMAN, GOLDBERG and GEE, Circuit Judges.

No Judge in regular active service on the Court having requested that the Court be polled on hearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Hearing En Banc is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-4064
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
DALLAS NORMAN HOUSE,
Defendant-Appellant.

Appeal From the United States District Court for the Northern District of Georgia

(May 7, 1976)

BEFORE COLEMAN, GOLDBERG and GEE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1] United States v. Gaines, 489 F.2d 690 (5th Cir. 1974).

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*Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
Office of the Clerk

Edward W. Wadsworth
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

June 16, 1976

TO ALL COUNSEL OF RECORD

No. 75-4064 - USA v. Dallas Norman House

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth, Clerk

By /s/ Susan M. Gravois
Deputy Clerk

/smg

cc: Mr. Robert B. Thompson
Mr. Herbert Shafer
Messrs. John W. Stokes
William F. Bartee, Jr.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

75-4064

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
DALLAS NORMAN HOUSE,
Defendant-Appellant.

Appeal From the United States District Court for the Northern District of Georgia

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ORDER:

(Filed June 25, 1976)

(XX) The motion of appellant for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

( ) The motion of ..... for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including ....., the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying

the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion for a further stay of the issuance of the mandate is GRANTED to and including ....., under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion for a further stay of the issuance of the mandate is DENIED.

/s/ Thomas Gibbs Gee
United States Circuit Judge

Supreme Court, U. S.
FILED
OCT 6 1976
MICHAEL RODAK, JR., CLERK

No. 76-118

In the Supreme Court of the United States

OCTOBER TERM, 1976

DALLAS NORMAN HOUSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-118

DALLAS NORMAN HOUSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court improperly excluded expert testimony concerning the different species of marihuana.

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of possession of marihuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and importation of marihuana, in violation of 21 U.S.C. 952(a). He was sentenced to five years' imprisonment on each count, to be served concurrently, and five years' special parole. The court of appeals affirmed *per curiam* on May 7, 1976 (Pet. App. A2), and denied a petition for rehearing with suggestion for rehearing *en banc* on June 16, 1976 (Pet. App. A3). The petition for a writ

of certiorari was filed on July 26, 1976, and is therefore out of time under Rule 22(2) of the Rules of this Court.

The evidence at trial showed that in August 1974 petitioner imported approximately 10,000 pounds of marihuana into the United States from South America. The government's witnesses included Charles Clark, a forensic chemist with the Drug Enforcement Administration, who identified the material seized from petitioner's airplane as marihuana. Although Clark did not specify the particular species of the plant, he testified that it contained tetrahydrocannabinol (THC), the active ingredient in marihuana, which he termed the substance that "makes marihuana what it is." Petitioner then sought to call a botanist to substantiate his so-called "specie defense," *i.e.*, that the federal statute defining marihuana refers to Cannabis sativa L. (21 U.S.C. 802 (15)); that, although botanists know that there are several separate species of the plant, there are at present no reliable chemical or spectrographic methods for distinguishing among them; and that it is therefore impossible to prove beyond a reasonable doubt that petitioner imported or possessed the particular species of marihuana proscribed by the statute. After hearing petitioner's offer of proof, the district court excluded the testimony.

Petitioner contends (Pet. 6-19) that the district court erred by refusing to allow his expert witness to testify and thus by determining that all species of marihuana are included within the statutory definition. Petitioner's "specie defense" was irrelevant to the issues at trial, however, since Congress clearly intended to prohibit the importation or possession of every species of marihuana, each of which produces the same hallucinogenic effect. This defense has been uniformly rejected by the ten courts of appeals that have considered it. See

United States v. *Honneus*, 508 F. 2d 566 (C.A. 1), certiorari denied, 421 U.S. 948; *United States* v. *Rothberg*, 480 F. 2d 534 (C.A. 2), certiorari denied, 414 U.S. 856; *United States* v. *Moore*, 446 F. 2d 448 (C.A. 3), certiorari denied, 406 U.S. 909; *United States* v. *Sifuentes*, 504 F. 2d 845 (C.A. 4); *United States* v. *Gaines*, 489 F. 2d 690 (C.A. 5); *United States* v. *Dinapoli*, 519 F. 2d 104 (C.A. 6); *United States* v. *Gavic*, 520 F. 2d 1346 (C.A. 8); *United States* v. *Kelly*, 527 F. 2d 961 (C.A. 9); *United States* v. *Spann*, 515 F. 2d 579 (C.A. 10); *United States* v. *Walton*, 514 F. 2d 201 (C.A. D.C.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1976.

DOJ-1976-10